STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,258
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) terminating her benefits in the Vermont Health Access Program (VHAP) based on excess income. The issue is whether "difficulty-of-care" payments made to the petitioner through the Department of Developmental and Mental Health Services (DDMHS) for care of a disabled adult should be counted as self-employment income.

FINDINGS OF FACT

1. The petitioner is a sixty-two-year-old woman who lives with her disabled husband. She cares for another disabled adult under a contract with a county mental health organization funded through the Vermont Department of Mental Health. Her 1999 contract with the agency provided the petitioner would train her disabled adult in life skills, arrange and provide transportation for him, dispense his medications, keep records and provide 24 hour supervision for

him. In return she would receive compensation of $21,700 per year from the Department known as a “difficulty-of-care” payment. The disabled adult pays his room and board separately out of his own Social Security income.

2. Some time ago, the petitioner and her husband both applied for health coverage from the Department. The petitioner’s husband as a disabled person was found eligible for Medicaid. The petitioner herself was found eligible for VHAP. The worker who did the eligibility determination did not include the “difficulty-of-care” payments as income to either spouse.

3. In the late Fall of 1999, a new worker reviewing the calculations questioned the exclusion of the "difficulty-of-care" payments and consulted with the policy unit for advice. The policy unit advised the worker that the regulations in the VHAP program do not allow for the exclusion of "difficulty-of-care" payments. The new worker recalculated the petitioner’s financial eligibility for VHAP using the $21,700 figure for "difficulty-of-care" payments. The petitioner was determined to be ineligible due to excess income and was so notified.

4. The petitioner appealed that notice and a hearing was waived in lieu of a stipulation. After no stipulation was forthcoming after two years, the matter was heard through a

stipulation on the record which incorporated certain documents.

5. The only dispute about the facts in this matter is the petitioner's contention that the termination of benefits represented a policy change on the part of the Department rather than the correction of a prior mistake. The petitioner has presented no evidence that the Department had a general policy of excluding "difficulty-of-care" payments prior to the Fall of 1999 from which it could be concluded that the agency interpretation had changed. Therefore, the Department's version of events—that the termination was a correction of worker error and that this instance was, in fact, the first time the policy unit had occasion to review and interpret this regulation—is found to be more credible. There is no dispute that the written policy found in the VHAP manual has stayed the same throughout all times relevant to this appeal.

6. Because the "difficulty-of-care" payments alone put the petitioner over the income limit for VHAP, no formal decision was reached as to whether room and board payments received by the petitioner directly from the disabled adult would be included as income. The Department indicated that it would likely not count such income as it was a reimbursement for expenses.

ORDER

The decision of the Department is affirmed.

REASONS

The Department of PATH has operated the Vermont Health Access Program since 1996 under a waiver from some of the requirements of the Medicaid program granted by the Health Care Financing Administration of U.S. Department of Health and Human Services. See Medicaid Manual (MM) 4000. The program operates under written regulations which were subjected to the APA rulemaking process before adoption. Among those regulations are sections which require that all earned and unearned income be counted in determining eligibility with certain enumerated deductions and exclusions. MM 4001.81. The only exclusion which addresses payments for the care of individuals is the following:

Excluded Income

. . .

16. Payments received for the care of foster children in the custody of, and placed by, the Department of Social and Rehabilitation Services. The rate of payment is established to cover expenses only, with no profit available; therefore, no income is considered available from this source.

MM 4001.82

The list of exclusions does not include payments made for the care of disabled adults by DDMHS. The petitioner argues that the language cited above should be read to cover "foster payments" made by DDMHS as well. In support of this view she argues that the Department has itself interpreted the regulation to cover these payments in a memo dated May 16, 1996. That memo contains a question asked by a worker with regard to MM 4001.82(16) and an answer given by the policy unit:

> QUESTION: Number 16 states that payments to the household for the care of foster children are excluded.
>
> ANSWER: Yes. The portion of the foster care payment for supervision and care is excluded. The portion of the payment for room and board is counted as income less any allowed business expenses.
>
> PP & D Memo
> Procedure Instruction
> May 16, 1996

This memo offers a "procedural instruction" with regard to paragraph number sixteen which impacts upon its operation as it affects payments made for foster children.[1] Its plain

[1] This "procedural instruction" which does not have the force of law does appear to be directly contrary to the language in paragraph sixteen of the regulation which does have the force of law. It also appears to contradict the language in the "business expense" section of the VHAP regulations which says that boarding care amounts furnished to foster homes of SRS are never counted as income. MM 4001.81(d). However, the validity of that "procedural instruction" as it affects child foster care

language cannot be read to extend the exclusion of foster payments made by SRS to "difficulty-of-care" payments made by DDMHS on behalf of disabled adults. The petitioner argues further that the Department's own prior interpretations have excluded "difficulty-of-care" payments citing the original grant to the petitioner. However, the facts show that the original grant was a worker mistake, not the result of a different interpretation by the policy unit. If there were any doubt about that, this PP & D offered by the petitioner shows that at least as far back as 1996 the only written interpretation of this regulation refers only to the exclusion of payments made on behalf of children and does not mention adult "difficulty-of-care" payments.

The lack of mention of adult "difficulty-of-care" payments in the VHAP income exception regulations does not appear to be an oversight. PATH has made the same distinction between the two types of care payments in the financial calculations in its ANFC program (and by extension the ANFC-related Medicaid program) as well[2]:

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payments is not before the Board in this case and no ruling is made thereon.

[2] Whether or not the federal regulations governing the Reach Up program allow such a distinction to be made is an issue that is neither before the Board nor decided in this decision. See 45 CFR 233.20 which requires the exclusion of "foster care payments" made by a state when calculating Reach Up income.

Business Expense

. . .

Exception: No computation is required for providing foster care to children in custody of and placed by the Department of Social and Rehabilitation Services. The rate of payment is established to cover expenses only, with no allowance for profit; therefore, no earned income is considered available from this source.

The room-and-board portion of income received by developmental home providers furnishing qualified foster care to individuals placed by the Department of Developmental and Mental Health Services (DDMHS) or by a developmental or mental health services agency under contract with DDMHS is established to cover expenses only, with no allowance for profit. Therefore, no earned income is available from this portion of the income. Compensation received in addition to that intended to cover room and board, considered "difficulty-of-care" payments, is earned self-employment income. Payment for respite care services from this source of income is an allowable business expense.

Welfare Assistance Manual (W.A.M.) 53.2

This regulation offers a rationale for treating these two payments differently. It is clear that PATH views foster care payments by SRS on behalf of children as “reimbursements” for expenses and "difficulty-of-care" payments as self-employment income. The petitioner has offered no evidence which would indicate that this is an arbitrary distinction.[3] The clear

[3] Foster care payments made on behalf of children are fairly low and are linked to amounts paid in the RUFA program for children’s basic needs. See W.A.M. § 2239-2243. "Difficulty-of-care" amounts are considerably higher and seem to reflect an attempt to compensate an individual for the expenditure of time needed to care for an individual.

distinction PATH has drawn between these two types of payments in other programs undermines any argument that they should be lumped together again in interpreting a regulation that on its face clearly does not include the DDMHS payments.

It must be concluded that the regulation in the VHAP program does not contain language nor indicate any intent to exclude "difficulty-of-care" payments from income in the calculation of eligibility. The petitioner argues in that event that the regulation is itself illegal both because it was not adopted pursuant to APA procedures and because it is contrary to the Medicaid program.

The petitioner's first argument is easily disposed of because it assumes a fact which was not proven: that the Department changed its policy with regard to adult foster care payments in 1999. There is no dispute that the Department validly adopted the written regulation at MM 4001.82(16) on May 15, 1996 after the notice and comment procedures set forth by the APA. There has been no showing that the Department has changed that regulation or its general interpretation as it relates to DDMHS "difficulty-of-care" payments since that time. The language of the regulation which underwent the APA process was sufficiently plain and detailed to put any

interested person on notice that only SRS child foster care payments would be excluded from income in the VHAP program.[4]

The petitioner's final argument is that the Department had no authority under the federal Medicaid regulations to adopt such a regulation. The federal Medicaid regulations themselves require the use of the financial methodology used by the cash assistance program most closely associated with the applicant's "category". 42 CFR 435.601. What that means is that persons who get Medicaid because they are disabled will use SSI methods and persons who are dependent children or the caretakers of such children would use the same method as the RUFA program.

The SSI financial methodology sets forth income exclusions for persons who receive foster care payments from state (and other) agencies for children in the home. 20 CFR 416.1124. In its SSI-related Medicaid eligibility regulations, PATH has interpreted SSI requirements as

[4] The petitioner argued before the Board that she should get a remand for a further hearing because the evidence was not well-developed on whether this was a mistake at the worker level or a change of interpretation at the policy level. The Board concludes that it is not essential to determine this fact and no remand is necessary. What mistakes or interpretations were made and by whom since the adoption of this regulation is irrelevant since the written regulation, not internal policy, is the applicable law and that written regulation has never changed. The Department has taken no other position in this hearing other than that the written policy adopted under the APA should be used to decide this issue. If the Department has misinterpreted its own written

excluding from both earned and unearned income “foster care payments received for children and/or adults who are living with the applicant/recipient and were placed there by a public or private nonprofit agency”.[5] MM 241.1(2) and MM 242.2(12). The RUFA program, as noted above, does not exclude adult "difficulty-of-care" payments when calculating eligibility. PATH has adopted this methodology when determining eligibility for its RUFA-related Medicaid recipients. See MM 350 et seq.

The petitioner argues that the VHAP program must follow these Medicaid regulations with regard to the methods for calculating financial eligibility because they were never “waived” by the federal government. Although she fits no Medicaid “category” (she is not aged, disabled, blind, pregnant or the parent of a dependent child) the petitioner appears to be arguing that the SSI-related rules should be

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policy in the past, the Department does not have to go through APA procedures to change its non-binding interpretations.

[5] No explanation was offered by PATH as to why adult foster care income is included here but not the other programs. It appears that this part of the regulation is being driven strictly by SSI requirements. The petitioner’s husband was found eligible for Medicaid under this section because the Department could not count her foster care payments as family income. However, if the petitioner’s husband were found eligible for SSI he would automatically be eligible for Medicaid so the Department did not have to really calculate his financial eligibility.

applied to her since only they would exclude her "difficulty-of-care" payments.[6]

As was mentioned at the outset of this discussion, the VHAP program exists as the result of waivers granted to Vermont by the Health Care Financing Administration of the U.S. Department of Health and Human Services (HHS). MM 4000. As the Board noted in Fair Hearing No. 16,748, federal courts have held that the express provisions of the waivers granted by HHS become the new federal law by which the program must be measured. See Boulet v. Celluci, 107 F. Supp.2d 61 (D. Mass., July 14, 2000); Makin v. Hawaii, 114 F. Supp.2d 1017 (D. Hawaii, November 26, 1999). The ultimate question for this tribunal is whether the waiver received by PATH allowed it to adopt new rules on calculating income for this demonstration project. The conclusion of this tribunal is that it did receive such a waiver.

In its official request for approval for the demonstration VHAP project, PATH stated that it wished to establish “new eligibility standards which are based on a simplified income test with no resource test applied”. The Vermont Health Access Plan: A Statewide Medicaid Demonstration

[6] As pointed out previously, the petitioner does not argue that the RUFA-related regulations which do not exclude "difficulty-of-care" payments are

Waiver Initiative, by the Agency of Human Services and the Health Care Authority, February 23, 1995, p. 2. In Chapter VII of the request, AHS specifically asked to waive Section 1902(a)(10)(A) of the Medicaid statute and the implementing regulations at 42 CFR 435. Id. at p. 78. The regulations at 42 CFR 435 are those which cover categorical and financial eligibility limits for the Medicaid program. Among those regulations is the one cited above at 42 CFR 435.601 which requires the adoption of SSI and RUFA-related financial methodologies in calculating eligibility for health benefits. As HHS granted this waiver request, it must be found that it released PATH from using any and all of the regulations regarding financial computation and categorical eligibility found in that section. Those sections of the Medicaid regulations regarding categorical eligibility and computation of financial eligibility are thus inapplicable to the VHAP program.

The waiver allows PATH the freedom to make new regulations within the confines of its approved goals. See Fair Hearing No. 16,748. PATH has decided that it will count "difficulty-of-care" payments as income to persons under the

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erroneous. That category, therefore, would be of no use to her here.

VHAP program.[7] It cannot be found that such a regulation conflicts with any Medicaid requirement or with the permissible goals of the VHAP program. The goal of the program is to expand health coverage to low-income persons. PATH has the authority under the waiver to define what a low-income person is and to determine what kind of income it will count. Although the petitioner may disagree with the Department's choices as a policy matter, that is no ground for invalidating its validly adopted regulations.

The petitioner points out, finally, that the Internal Revenue Service has adopted a regulation which treats all foster care payments made to a taxpayer, including "difficulty-of-care" payments made by a state on behalf of handicapped adults as excludible income for taxation purposes. See 26 USC § 131. This is no doubt a laudable policy because it will encourage individuals to take on the care of children and disabled adults and avoid the public expense and

[7]It should be noted that the new PATH regulations have also diverged dramatically from the Medicaid regulations in that they do not allow deductions from income for medical expenses, a regulation which the Board has upheld repeatedly. See Fair Hearing Nos. 17,282, 17,244, and 17,204.

undesirability of institutionalization. However, one federal agency's decision on how to treat income is in no way binding on another federal or state agency. Vermont has made a clear choice not to exclude such income in its VHAP program which it has a legal right to do. Even were the Board to agree with the petitioner that it would be desirable to exclude such income from all public benefit programs, the Board has no authority to substitute its own policy views for that of the Department. The decision of PATH to include the "difficulty-of-care" payments as income in the VHAP program should be affirmed. 3 V.S.A. § 3091(d) and Fair Hearing Rule 17.

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